SUPREME COURT, U. S.

IN THE

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968
No. 855

GEORGE ULLMAN and JOE SIMON,

Petitioners,

vs.

KYLE Z. GRAINGER, JR.,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT, KYLE Z. GRAINGER, JR.

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BRIEF IN OPPOSITION FOR RESPONDENT, KYLE Z. GRAINGER, JR.

This Brief in opposition to the Petition for a Writ of *Certiorari* is submitted on behalf of the Reorganization Trustee appointed under the provisions of Chapter X of the Bankruptcy Act (11 U.S.C. §501).

Introduction.

The Petition for Writ of *Certiorari* seeks review by this Court of the decision of the United States Court of Appeals for the Ninth Circuit entered on June 18, 1968. The opinion of the court of appeals is reported at 396 F. 2d 635 (9th Cir. 1968). The judgment and opinion of the court of appeals determined three separate appeals (subsequently consolidated) from three separate orders concerning the sale and subsequent resale of certain real property of the Reorganization Estate. The Orders affirmed were:

1. The Order of the district court of April 26, 1967 entered *ex parte* vacating the prior Order approving sale to Ullman and Simon [Cl. Tr. 27].*

2. The Order of the district court entered May 22, 1967 after full hearing denying the Petition of Ullman and Simon for reinstatement of the Order approving sale [Cl. Tr. 146].

3. The Order of the district court entered August 3, 1967 approving and confirming the sale of the real property to another party (Joe's Auto Parks) [Cl. Tr. 190].

Counterstatement of the Case.

The Reorganization Trustee offered certain real property of the Estate for sale in the courtroom of the Special Master and Referee in Bankruptcy. An offer of $275,000 was made by Petitioners Ullman and Simon and an Order approving the sale and authorizing the Trustee to sign escrow instructions was entered February 14, 1967 [Cl. Tr. 18]. The escrow instructions attached to the Order approving sale were not signed and were subsequently superseded by signed escrow instructions dated February 10, 1967 [Cl. Tr. 33]. (Appendix A hereto). The obligation of the Trustee to complete the sale was expressly conditional due to the Estates relatively small equity in the property over existing encumbrances and taxes and the burden of the continuing accumulation of interest and taxes upon the Trustee. The escrow instructions also reserved to the Trustee the privilege of abandoning the escrow if he determined he could not deliver possession of the property free of an existing

*Cl. Tr. refers to the Clerk's Transcript of the Record.

parking lot lease and limited the Trustee's liability for failure to close the escrow to the return of the buyer's deposit and payment by the Trustee of all escrow and title charges (Appendix A, p. 4, paragraph 4 of the escrow instructions).

While the escrow was pending, the Trustee was advised that the parking lot lease on the real property did not contain a cancellation clause. Nevertheless, the Trustee attempted to compel or negotiate a surrender of the premises by the auto park lessee, but those attempts failed. The Trustee's counsel immediately advised Petitioners' counsel of the results of the negotiations in a letter dated and mailed March 23, 1967 [Cl. Tr. 109]. (Appendix B hereto). The letter of March 23, 1967 advised the buyers that the Trustee would be required to refund their deposit and cancel the sale unless the buyers would accept the property subject to whatever rights had been created in the tenant. The buyers refused to accept the property under those conditions, but instead sought to require the Trustee to undertake litigation against the tenants [Cl. Tr. 116].

Shortly thereafter, the Reorganization Trustee, acting under the terms of the escrow, obtained an *ex parte* Order authorizing the return of the buyers' deposit and abandonment of the sale escrow (The Order of the district court of April 26, 1967) [Cl. Tr. 27]. Thereafter, the property was reoffered for sale subject to the parking lot lease. After spirited bidding in which Petitioners did not participate, a high bid of $309,000 was made by Joe's Auto Parks. The sale was approved and confirmed by the court's Order of May 4, 1967 [Cl. Tr. 42].

On May 5, 1967, without notice to the Trustee, Petitioners filed an *ex parte* Application for an Order vacating the court's Order of April 26, 1967 (which authorized the Trustee to abandon the escrow) and for an Order reinstating the prior sale Order of February 14, 1967 in favor of Petitioners Ullman and Simon [Cl. Tr. 50]. After a lengthy hearing, the Petition to reinstate the sale to Ullman and Simon was denied and the Order of April 26, 1967 authorizing abandonment of the sale to Ullman and Simon was reinstated [Cl. Tr. 146]. Petitioners filed a Motion for rehearing which was heard at great length on June 19, 1967 [Cl. Tr. 158]. On June 21, 1967, the court entered its Order denying the Motion for rehearing. Thereafter, on August 3, 1967, the reorganization court entered its Order reinstating and approving the sale to Joe's Auto Parks for $309,000 [Cl. Tr. 182].

Counterstatement of Questions Proposed.

The Petition herein does not present any question which is sufficiently special or important to warrant review by this Court. This case does not involve questions of due process, nor of the integrity of judicial sales, but involves simply a question of contract interpretation and the application of ordinary principles of contract law.

ARGUMENT.

I.

Certiorari Should Not Be Granted to Review a Judgment Based Upon Application of Settled Principles of State Contract Law to Particular Facts.

This case does not involve rules of law concerning which there is any conflict among the courts of appeals or between the decision below and applicable decisions of this Court. The court of appeals' decision does not rest upon any unsettled questions of federal or state law; rather, this case concerns the application of settled principles of contract law and the exercise of judicial discretion.

The sole question presented is the buyers' right to specific performance of the contract of sale against the Reorganization Trustee, in spite of the failure of express conditions precedent and the privilege reserved by the Trustee to abandon the sale contract upon refunding the buyers' deposit and payment of escrow costs. The question is one of contract interpretation and application of California law.

II.

This Case Does Not Present Any Issue of (1) Due Process, (2) Sanctity of Judicial Sales, or (3) the Granting to the Reorganization Trustee the Discretionary Power to Abandon Confirmed Sales.

1. Due Process.

Petitioners contend that vested, unconditional property rights were taken from them by an *ex parte* Order of the reorganization court. The facts are quite to the contrary. The rights vested in Petitioners

by the sale contract were expressly conditioned upon a 30 days cancellation clause in a parking lot lease. The lease had no cancellation clause and by the terms of the contract, the Trustee was privileged to abandon it without any liability except only to refund the buyers' deposit and to pay the escrow fees. The Reorganization Trustee promptly and fully complied with the contract by directing the escrow holder to return the buyers' funds and to charge the Reorganization Trustee with the fees and costs. Although it was not legally necessary for the Trustee to seek an Order of the reorganization court, he did so on his counsel's advice in order to provide authority to return from the general funds of the Estate the $5,000 portion of the sale deposit theretofore made by buyers with the Trustee.

Even if it be conceded, *arguendo,* that Petitioners were entitled, as a matter of right, to notice and to a hearing on the Trustee's Application for authority to terminate the pending escrow and return to the buyers their deposit that error has been cured by the subsequent actions of the reorganization court. On May 5, 1967, without notice to the Reorganization Trustee, these Petitioners filed an Application with the reorganization court for an Order vacating the court's Order of April 26, 1967 and for an Order reinstating the prior sale Order of February 10, 1967. On May 5, 1967, an Order to Show Cause was issued *ex parte* on Petitioners' Application and on May 8, 1967, the reorganization court issued an *ex parte* Order vacating its Order of May 4, 1967 which had approved and confirmed the sale of May 1, 1967 to Joe's Auto Parks. After a lengthy hearing before the reorganization court on May 15, 1967 [R. Tr. Vol. III]* the court denied the Motion of

*R. Tr. III—Reporter's Transcript, Volume III.

Petitioners and reinstated the Order of April 26, 1967.

Petitioners filed a tardy Motion for rehearing on June 8, 1967 and although the Motion was not timely under Rule 59b of the Federal Rules of Civil Procedure, nevertheless the reorganization court conducted another full hearing and then denied the Motion.

In short, even if Petitioners had a right to prior notice of the Trustee's Application filed April 26, 1967, they were granted two hearings on that Application and, pending the full hearings, the court suspended or vacated its prior Orders of April 26, 1967 and May 4, 1967. Petitioners cannot, in good faith, claim any lack of due process in these proceedings.

2. Sanctity of Judicial Sales.

Respondent agrees that a sale in bankruptcy is a judicial sale and that the integrity of judicial sales should be preserved, but as the court of appeals pointed out, the Trustee did not attempt to abrogate any of the terms of the sale; instead, the Trustee simply exercised rights expressly granted him by the contract of sale.

Petitioners ignore the express terms and conditions of the escrow instructions and have presented their case as though it involved merely the vacating of an unconditional Order confirming sale. However, as Collier points out "the rights and quantum of property acquired by the purchaser depend primarily upon the terms of the sale as ordered or *agreed upon.*" (Emphasis supplied).

4A Collier on Bankruptcy, 1198 (14th Ed. 1967).

For a similar case see *Walker v. Harper,* 133 F. 2d 418 (5th Cir. 1943), which also involved a conditional sale.

3. The Granting to the Reorganization Trustee the Discretionary Power to Abandon Confirmed Sales.

The Petitioners allege that the decision of the district court as affirmed by the court of appeals has granted to the Trustee the discretionary power to abandon judicially confirmed sales. This is a gross misstatement of the instant case. The power to abandon the sale was reserved by the Reorganization Trustee in the contract of sale, and the Order confirming sale merely authorized the Trustee to conclude the sale. If the contentions of Petitioners were accepted, a bankruptcy or reorganization trustee would be at a greater disadvantage in effecting sales than a private party and would be judicially bound to complete a sale although conditions precedent have failed or the buyer has breached his covenants.

Conclusion.

This case was carefully considered by three courts below: The Referee in Bankruptcy and Special Master, the district court and the court of appeals. It does not present any novel questions, any conflict among the circuits or even any federal or bankruptcy question. It merely involves the application of well settled principles of contract law to a particular fact situation.

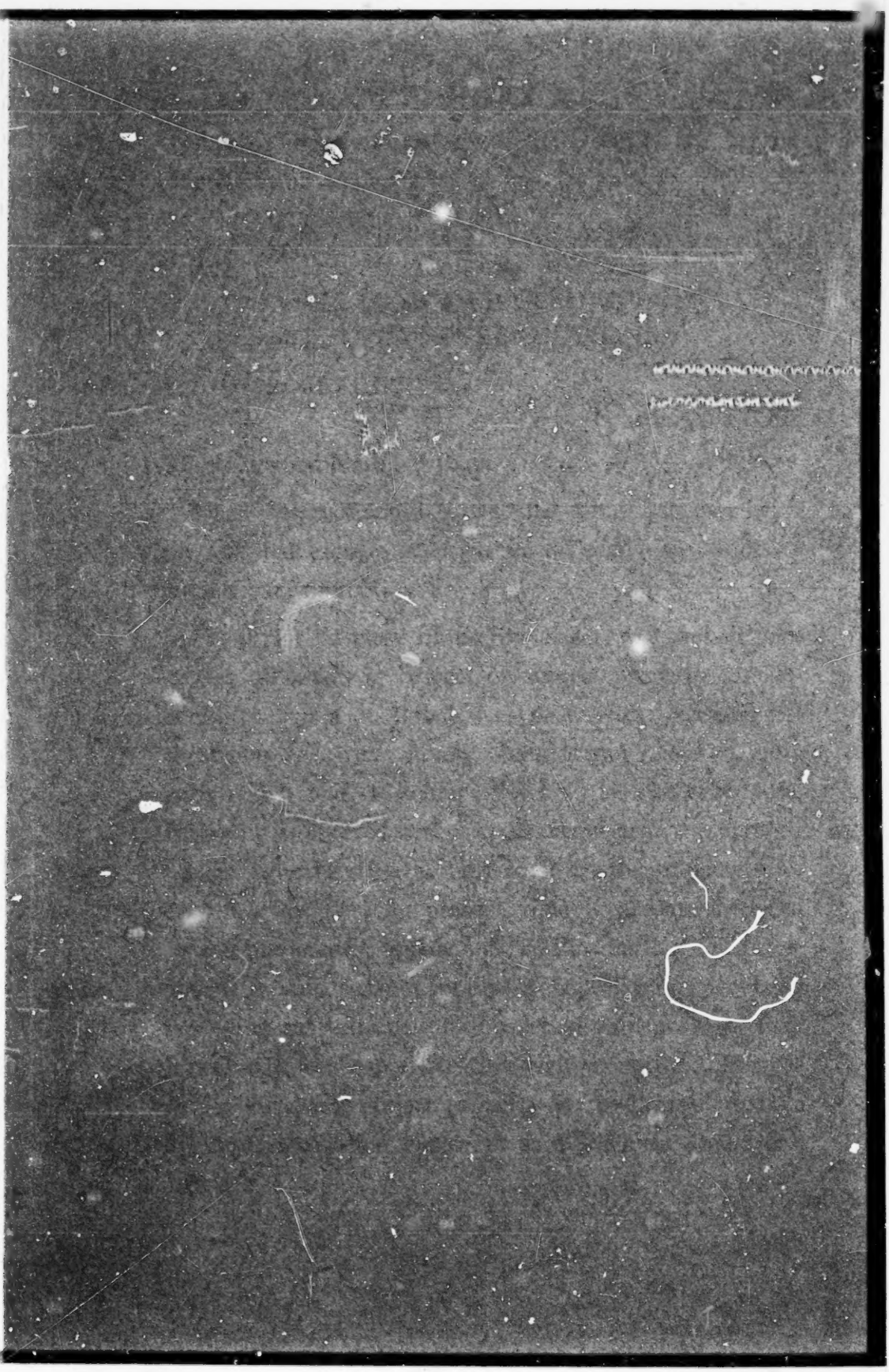
The Petition for Writ of *Certiorari* should be denied.

Dated: January 13, 1969.

Respectfully submitted,

ARNOLD M. QUITTNER,
JERROLD K. GUBEN,
Attorneys for Respondent, Kyle Z. Grainger, Jr.

GENDEL, RASKOFF, SHAPIRO &
QUITTNER,
Of Counsel.



APPENDIX A.

Superseding previous instructions which are hereby cancelled, null and void.

HOLLYWOOD NATIONAL BANK

Page 2

ESCROW DEPARTMENT
ESCROW INSTRUCTIONS

Escrow No. 363-GB

February 10, 1967

To Hollywood National Bank

These instructions are executed simultaneously with the original escrow instructions of even date, and are made a part thereof.

(1) Prior to close of escrow seller will deliver into escrow all leases in respect of subject property for delivery to buyer at close of escrow, with executed assignments in buyer's favor. As a matter of record only with which escrow holder is not to be concerned, the following is entered herein at the request of the parties: "Seller believes that the only lease on the subject property in effect at the present time is a lease between seller's predecessor in title and the Parking Lot Operator, and that said lease contains a cancellation provision providing that any new purchaser of said property may cancel said lease upon 30 days written notice. The offer to purchase subject property is conditioned upon a 30 day cancellation clause in said Parking Operator's Lease."

(2) Buyer has heretofore paid to seller, outside of this escrow the sum of $27,500.00. In the event buyer fails to deposit the balance of the funds within 30 days from date hereof, and provided seller has performed everything required of him in order to close this escrow, then in that event, this escrow may be extended for an additional 90 days at the sole option of the buyer by written notice to escrow holder and to seller, but upon buyer so extending this escrow, seller shall be entitled to apply to interest on the note secured by first trust deed of record, and taxes accruing during the escrow period such portion of the $7,500.00 deposit retained by seller outside of escrow, as may be required on a pro-rata basis up to the actual date of closing this escrow. The maximum liability of buyer for said proration of the aforesaid interest on the first trust deed and taxes shall not exceed $2,000.00 per month. In the event that this escrow fails to close within the additional 90 day period due to any default on the part of the buyer, then in that event this escrow shall be deemed terminated and all documents deposited by seller shall be returned to seller. The following is entered herein at the request of the buyer and seller as a matter of record only with which escrow holder is not to be concerned: "In the event of such aforementioned termination seller shall retain the balance of said $27,500.00 deposit as liquidated damages and neither buyer nor seller shall thereafter have any claims, demands or causes of action, one against the other, nor shall buyer have any right, title or interest, lien, charge or encumbrance in or to or against said real property. The purchase of the personal property is conditioned upon

the buyer completing the purchase of the real property and likewise, the purchase of the real property is conditioned upon the buyer completing the purchase of the personal property. With respect to the right of seller to apply to interest and taxes a portion of the $27,-500.00 deposit as provided herein, to the extent of such application, the seller must be reimbursed prior to close of escrow so that at close of escrow the seller will have not less than $27,500.00 on hand. As an example, in the event that the escrow is extended beyond the initial 30 days and into the additional 90 day period, and if, during said 90 day period, the seller is entitled to apply to interest and taxes the total sum of $5,-000.00 from the deposit so that the deposit is reduced to $22,500.00, then buyer must, prior to close of escrow, pay to seller an additional $5,000.00 to bring the deposit back up to the original $27,500.00 level."

(3) In the event that buyer is ready to close this escrow within the initial period of 30 days or in any extended period as set forth in paragraph 2 above, and seller is not able to deliver possession of the parking lot premises to buyer at the time when escrow is ready to be closed by buyer by the deposit of the balance of the funds due from him, then it is agreed that seller and not buyer will be charged with the pro-ration of interest on the first trust deed and taxes from that period of time when the escrow could have been closed by the buyer until the time when the escrow actually closes. Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer.

Superseding previous instructions which are hereby cancelled, null and void.

HOLLYWOOD NATIONAL BANK

Page 3

ESCROW DEPARTMENT
ESCROW INSTRUCTIONS

Escrow No. 363-GB

February 10, 1967

To Hollywood National Bank

These instructions are executed simultaneously with the original escrow instructions of even date, and are made a part thereof.

(3) Continued from page 2

In that event there shall be no liability on the part of the seller except to pay escrow and title expenses incurred, and the seller will be required to return to the buyer the sum of $27,500.00 previously deposited with Kyle Z. Grainger, Jr., the Trustee herein, of which the sum of $7,500.00 has been retained by said Kyle Z. Grainger, Jr., and the balance of $20,000.00 has been deposited into this escrow."

(4) In the event that this escrow fails to close due to any default or inability of the seller to deliver a good and marketable title or any other default on the part of the seller, then seller's sole responsibility to buyer shall be the return of buyer's deposit of $27,500.00 without offsets or costs, and seller agrees to pay all escrow and title charges incurred.

APPENDIX B.

March 23, 1967

2340/7

John N. Frolich, Esq.
727 West Seventh Street
Los Angeles, California

Re: Human Relations Research Foundation
(University of America Foundation)

Dear Mr. Frolich:

As you know, I met with the attorneys for Charter Auto Parks this morning to discuss the relinquishment of possession of the 929 South Hope Street parking lot. Irving Sulmeyer could not attend the meeting, and Robert Alberts, of his office, sat in on the meeting together with Wolk and Karno. Their position was apparently adamant with respect to voluntarily relinquishing possession. They insisted, among other things, that the Reorganization Estate was in no position to complain about the lease of January, 1966 with University of America because the Trustee had joined in obtaining an Order for application of the rental proceeds to the Scottish Rite Foundation and that this act amounted to an acceptance of the lease. It appears to me at this moment that there will be no voluntary surrender of the premises and that Charter is going to rely upon the lease of January 20, 1966 which was executed by Charles Simmons II as President of University of America Foundation and against which Simmons received $2,200 as payment for the 35th and 36th months of the term. Unfortunately, there was no provision in the lease for cancellation upon sale of the property.

Under the existing circumstances and in view of the apparent intent of Charter Auto Parks to litigate the matter, the Trustee now advises you on behalf of the buyers (George Ullman and Joe Simon) that it appears unlikely that possession of the parking lot can be delivered within a reasonable period of time and, accordingly, it now appears that the Trustee will be required to refund the deposit of $27,500. Please advise me on or before 5:00 p.m., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in Charter Auto Parks or their successors by reason of the lease of January 20, 1966.

It is particularly unfortunate that the reorganization estate has been placed in this position in view of my letter of December 18, 1964 to Charles Simmons II, a copy of which is enclosed herewith.

Very truly yours,

ARNOLD M. QUITTNER

AMQ:pj
Enclosure

cc: Honorable James E. Moriarty (w/encl.)
Kyle Z. Grainger, Jr., Esq. (w/encl.)